No. 73-5677

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

MAURICE SCHICK, Petitioner,

v.

GEORGE J. REED, WILLIAM E. AMOS,
CURTIS C. CRAWFORD, WALTER DUNBAR, and
GERALD E. MURCH, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

HOMER E. MOYER, JR.
ROBERT N. SAYLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

October 31, 1973

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING THE WRIT	7
I	7
II	13
CONCLUSION	20
APPENDIX	
President's Commutation Action	21
Opinion of the Army board of review	22
Opinion of the Court of Military Appeals	26
Opinion of the Army board of review on reconsideration	28
Opinion of the Court of Military Appeals	33
Opinion of the Court of Appeals	41
Order Denying Petition for Rehearing	58

TABLE OF AUTHORITIES

CASES

Anderson v. State, 267 So.2d 8, ___Fla. ___.(1972). 7, 8

Application of White, 2 N.Y.S.2d 582, 166 Misc. 481 (1938) 14

Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959) 9

Biddle v. Perovich, 274 U.S. 480 (1927).13, 14, 15, 16, 18

Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) 17

Page

Burgett v. Texas, 389 U.S. 109 (1967). 10

Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972). 8

Ex parte Grossman, 267 U.S. 87 (1925). 18

Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929). . 17

Ex parte Webbe, 332 Mo. 859, 30 S.W. 2d 612 (1929). 14

Ex parte Wells, 59 U.S. (18 How.) 307 (1855) 11, 14,16, 17, 18

Furman v. Georgia, 408 U.S. 238 (1972). 2, 6, 7, 11, 12

Garcia v. State, 501 P.2d 1128 (Okla. Cr. 1972). . 8

Gideon v. Wainwright, 372 U.S. 335 (1963). . . . 10, 11

Graham v. State, ___ Ark. ___, 486 S.W.2d 678 (1972). 8

Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972). 7

Illinois v. Bosworth, 133 U.S. 92 (1890) 14

In re Conditional Discharge of Convicts, 73 Vt. 414, 51 A. 10 (1901). 14

Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952). 9

Kavalin v. White, 44 F.2d 49 (10th Cir. 1930). . 14, 17

Kitchens v. Smith, 401 U.S. 847 (1971) 10

Loper v. Beto, 405 U.S. 473 (1972) 10

Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937), cert. denied, 303 U.S. 646 (1938). 14

Marks v. Louisiana, 408 U.S. 933 (1972) 7

McKnight v. Hunter, 98 F. Supp. 605 (D. Kans. 1951). 9

O'Callahan v. Attorney General, 230 F. Supp. 766, aff'd 338 F.2d 989 (1st Cir. 1965), cert. denied, 381 U.S. 926 (1964). 9

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972) 8

Page

People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972). 7

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) . . . 10

Robinson v. Neil, 409 U.S. 505 (1973). 7

Schwab v. Berggren, 143 U.S. 442 (1892). 14

Semmes v. United States, 91 U.S. 21 (1875) 18

State v. Baker, 81 Wash. 2d 281, 501 P.2d 284 (1972). 11

State v. District Court, 73 Mont. 541, 237 P. 525 (1925). 14

State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972). 8

State v. Peters, 43 Ohio St. 629, 4 N.E. 81 (1885) 14

State v. Square, 263 La. 291, 268 So.2d 229 (1972) 8

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) 8

Stewart v. Massachusetts, 408 U.S. 845 (1972). . . 7

Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), cert. denied, 321 U.S. 796 (1944). 17

Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972). 7

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 18

United States v. Six Lots of Ground, 27 Fed.Cas. 1097 (1872). 14

United States v. Tucker, 404 U.S. 443 (1972) . . . 10

United States v. Wilson, 32 U.S. (7 Pet.) 94 (1833) 14, 17, 18

Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953) . 17

Walker v. Georgia, 408 U.S. 936 (1972) 7

Whittington v. Stevens, 221 Miss. 598 73 So.2d 137 (1954). 14

Page

CONSTITUTION AND STATUTES

Constitution of the United States:

Article II, Section 2 . . . . . 2, 3, 13, 14
Eighth Amendment. 3, 6

10 U.S.C. §§ 857, 858. 12

10 U.S.C. § 871 . . . . . 5, 12

10 U.S.C. § 918 . . . . . 3, 9

10 U.S.C. §§ 952, 953. 9

18 U.S.C. §§ 4202, 4203 . . . . . 5, 9

28 U.S.C. § 1254(1). 2

MISCELLANEOUS

59 Am. Jur.2d §§ 3, 7, 8 14

Black's Law Dictionary (4th ed. 1968) 14

Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) 9, 11, 12

Headquarters, Department of the Army, Army Regulation 190-26 (1972). 9

Humbert, The Pardoning Power of the President (1941) 13, 14

Manual for Courts-Martial, 1969 (Revised edition). 9, 11, 12

Moyer, Justice and the Military (1972) 12

41 Op. Atty. Gen. 251 (1955) 14, 17

Rules of the United States Board of Parole (1965) 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

MAURICE SCHICK, Petitioner,

v.

GEORGE J. REED, WILLIAM E. AMOS, CURTIS C. CRAWFORD, WALTER DUNBAR, and GERALD E. MURCH, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Maurice Schick, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the Army board of review was not reported. The opinion of the Court of Military Appeals remanding the case to the board of review for reconsideration of the accused's sanity is reported at 6 U.S.C.M.A. 209. The opinion of the board of review on reconsideration is reported at 21 C.M.R. 343. The subsequent opinion of the Court of Military Appeals is reported at 7 U.S.C.M.A. 419. All four opinions are reprinted in the appendix to this petition beginning at page 22.

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia, which affirmed the District Court's order granting the defendant's Motion for Summary Judgment, is reported at _____F.2d____ (D.C. Cir. 1973) and is reprinted in the appendix to this petition beginning at page 41.

JURISDICTION

The opinion of the Court of Appeals, which constitutes its judgment, was rendered on July 23, 1973. A timely petition for rehearing was denied on October 1, 1973, by an order which appears in the appendix to this petition at page 58. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the no-parole condition on the commutation of petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under Furman v. Georgia, 408 U.S. 238 (1972), and its progeny.

2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Article II, Section 2 power of the President "to grant reprieves and pardons for offenses

against the United States . . ." and the Eighth Amendment prohibition against the imposition of "cruel and unusual punishments."

STATEMENT OF THE CASE

Petitioner, Maurice Schick, a Master Sergeant in the United States Army, was tried by general court-martial in 1954 for the murder of the young daughter of a senior Army officer. The only contested issue at trial was the sanity of the accused. Two civilian Japanese psychiatrists -- one from the Department of Neuro-Psychiatry of Tokyo University Medical School, the other the Superintendent of Tokyo Metropolitan Matsuzawa Mental Hospital -- examined the accused and found that he was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish right from wrong or to adhere to the right. Four Army psychiatrists, however, testified for the prosecution that the accused was suffering from a non-psychotic behavior disorder and that he could adhere to the right and possessed the mental capacity to stand trial. Relying on this latter testimony, the Army court-martial rejected the accused's defense of insanity, convicted him of premeditated murder under Article 118 of the Uniform Code of Military Justice (10 U.S.C. § 918), and sentenced him to death.

On review, an Army board of review affirmed the conviction and sentence in an unpublished opinion. In support of its conclusion, the board cited a Surgeon General's opinion, based on a review of the record, that the accused possessed both mental responsibility at the

time of the offense and mental capacity at the time of trial. The case was then forwarded for further review to the civilian Court of Military Appeals which granted a continuance prior to argument to allow further civilian psychiatric examination. The accused was examined by psychiatrists and psychologists at the Menninger Clinic, including Dr. Menninger himself, who submitted to the court a report stating that in their opinion the accused was "unable to adhere to the right with regard to the offenses charged at the time he committed the crime." Presented with this new report, the Court of Military Appeals remanded the case to the board of review for reconsideration of the sanity issue.

Also presented as other new evidence to the board of review were a report by Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D.C., and a second opinion by the Surgeon General. Dr. Overholser's opinion was that without doubt the accused was unable at the time of the offense to adhere to the right or to formulate the requisite premeditation and "'that Schick is entitled to a verdict of acquittal by reason of insanity.'" The Surgeon General stated in his second report that despite the Menninger report he adhered to his original opinion.

Upon reconsideration, the Army board of review, after considering the Menninger Clinic opinion, the Overholser opinion, the Surgeon General's second report, and the evidence of record, again affirmed the findings and

sentence. The Court of Military Appeals, empowered to consider only questions of law, affirmed by a 2-1 decision. As required by statute, the case was then forwarded to the President for final review. 18 U.S.C. § 871(a).

In 1960, six years after Schick had been sentenced to death, President Eisenhower, exercising his authority under Article II, Section 2 of the Constitution, commuted Schick's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that Schick never be eligible for consideration for parole. Then, as required by statute (10 U.S.C. § 871(a)), the President ordered the sentence, as modified, executed and directed that Petitioner be committed to the custody of the Attorney General. (The President's action is set forth in the appendix to this petition at page 21.) Petitioner was accordingly dishonorably discharged from the Army and transferred to the federal penitentiary at Lewisburg, Pennsylvania.

Petitioner has now been incarcerated for more than 15 years. Under applicable statutes (18 U.S.C. § 4202-03) and Regulations (Rules of the United States Board of Parole effective July 1, 1965, at 8-11), Petitioner would have become eligible to be considered for parole in March, 1969, but for the no-parole condition in President Eisenhower's "commutation" action of March 25, 1960.

In 1971, Petitioner sought a declaratory judgment in United States District Court to require the

chairman and members of the United States Parole Board to consider him for parole. At a hearing on November 5, 1971, the United States District Court for the District of Columbia (per Hart, J.) dismissed the case for lack of subject matter jurisdiction. The Court of Appeals summarily reversed and remanded the case to the District Court for further action. On March 24, 1972, the District Court granted the Board of Parole's Motion for Summary Judgment "on both constitutional and military justice grounds . . .." The Court of Appeals, by split decision, affirmed the District Court. ____F.2d___ (D.C. Cir. 1973). A majority of the court held that the retroactivity of Furman v. Georgia, 408 U.S. 238 (1972), is irrelevant to Petitioner on the grounds that when Furman was decided Petitioner was "not under a death sentence." ___F.2d at ___. The Court also concluded that the President's action was not otherwise unlawful and that the condition imposed did not constitute cruel and unusual punishment. In dissent, Judge Wright expressed the view that the retrospective application of Furman requires that the death sentence imposed by court-martial be vacated and replaced by the only other sentence which could lawfully have been imposed, life imprisonment with the possibility of parole. A Petition for Rehearing and Suggestion for Rehearing En Banc filed on August 21, 1973, was denied October 1, 1973.

Petitioner does not ask to be released from confinement. Judgment in his favor would entitle him only to the right to be considered for parole.

REASONS FOR GRANTING THE WRIT

I.

The first question presented raises a fundamental issue regarding the effect and implementation of Furman v. Georgia, 408 U.S. 238 (1972). The decision by the divided court below directly undercuts this Court's rulings that Furman shall be applied retrospectively and is inconsistent with prior holdings on the retroactivity of constitutional decisions.

By per curiam decision, this Court in Furman v. Georgia, invalidated the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. This decision has been accorded fully retroactive effect. Robinson v. Neil,409 U.S. 505, 508 (1973); Stewart v. Massachusetts,408 U.S. 845 (1972); Marks v. Louisiana,408 U.S. 933 (1972); Walker v. Georgia, 408 U.S. 936 (1972).

Following these decisions, lower courts have hold that prisoners sentenced to death must have their sentences vacated and judgments modified to provide for alternative sentences provided by statute. The action of lower courts has ensured that such prisoners be treated as though the death sentence had never been imposed. Cases in which the trial court could have imposed more than one sentence other than death have been remanded for resentencing.[1/] Where, as in the instant case, only one

---

1/ E.g., Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734, 736 (1972); People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972); Anderson v. State, ___Fla.___, 267 So.2d 8, 10 (1972). Cf. Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972).

alternative punishment was available to the trial court, that punishment has been automatically imposed.[2/] In some cases the appellate court itself imposed the lesser punishment.[3/] In others, appellate courts have remanded with directions that the trial court impose the alternate punishment.[4/]

In this case a majority of the District of Columbia Court of Appeals held that Furman, effective retroactively, has no effect on the no-parole condition of petitioner's commuted death sentence, even though such a condition could not have been imposed had not the death sentence been assessed against the petitioner. The court reasoned that no action was required because at the time Furman was decided petitioner was not "under a death sentence." ___F.2d at ___. This conclusion is inconsistent with this Court's holdings in Furman and its progeny, conflicts with the decisions of other lower courts which have treated past impositions of the death sentence as nullities, and disregards existing case law on the retroactivity of constitutional holdings.

2/ State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972); Capler v. State, ___Miss.___, 268 So.2d 338 (1972); State v. Square, 263 La. 291, 268 So.2d 229 (1972); Garcia v. State, 501 P.2d 1128 (Okla. Cr. 1972); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); Graham v. State, ___Ark.___, 486 S.W.2d 678 (1972); Anderson v. State, supra. See also People v. Anderson, 6 Cal.3d 628, 657 n. 45, 493 P.2d 880, 899-900 n. 45 (1972).

3/ E.g., State v. Johnson, supra; Commonwealth v. Bradley, supra; Anderson v. State, supra.

4/ E.g., Capler v. State, supra; State v. Square, supra; Garcia v. State, supra; Graham v. State, supra; State v. Waddell, supra.

It is incontestable that the no-parole condition could not now exist if the court-martial that originally tried Schick had not imposed the death penalty. Article 118 of the Uniform Code of Military Justice authorizes only two sentences for a conviction of premeditated murder: death or life imprisonment. 10 U.S.C. § 918. Had petitioner been sentenced to life imprisonment, he would now be eligible for parole under the same standards as all other federal prisoners. 18 U.S.C. §§ 4202-03 (1970).[5/] Confinement without opportunity for parole is unknown to military law: it is not authorized punishment for any offense under the UCMJ and may not be imposed by military reviewing authorities acting to commute a sentence. Para. 88c, Manual For Courts-Martial, 1969 (Revised edition), Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) (hereinafter cited as MCM, 1969 (Rev.)). In short, the no-parole condition of the commutation stems solely from the court-martial's imposition of the death sentence; but for the imposition of that sentence it could not now exist.

5/ Military prisoners may be confined in military confinement facilities (United States Disciplinary Barracks in the case of Army prisoners) or, as was Schick, transferred to a federal penitentiary. Military prisoners incarcerated in federal penitentiaries are governed by the same statutes and regulations applicable to all federal prisoners, 18 U.S.C. §§ 4202-03 (1970). See 10 U.S.C. § 858 (1970); Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952); McKnight v. Hunter, 98 F. Supp. 605 (D. Kans. 1951); Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959); O'Callahan v. Attorney General, 230 F. Supp. 766, aff'd, 338 F.2d 989 (1st Cir. 1965), cert. denied, 381 U.S. 926 (1964). Had Schick been confined in the United States Disciplinary Barracks rather than federal prison, he would likewise now be eligible for parole under the appropriate statutes and regulations. 10 U.S.C. §§ 952-53 (1970); Headquarters, Department of the Army, Army Regulation 190-26, Ch. 1, para. 1-4(a)(2) (March 20, 1972).

Equally clear is that petitioner, who remains ineligible for parole, continues to suffer adverse effects of the imposition of the original death sentence, now declared to have been illegal.

Under precedents on retroactivity, both direct and indirect consequences of a violation of a criminal defendant's rights must be eradicated when a constitutional ruling is held to be retroactive. The implementation of Gideon v. Wainwright, 372 U.S. 335 (1963), holding that an indigent defendant in a state felony trial is constitutionally entitled to appointed counsel, provides several such examples. Holding Gideon to be retroactive, this Court eliminated the direct consequences of prior violations of Gideon standards by invalidating the convictions of prisoners serving sentences assessed at state felony trials at which they had not been represented by counsel. Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Kitchens v. Smith, 401 U.S. 847 (1971). In addition, this Court granted relief from indirect adverse consequences suffered by persons who had already served their sentences. E.g., Burgett v. Texas, 389 U.S. 109 (1967) (conviction reversed where indictment reciting prior convictions invalid under Gideon was read to jury at beginning of trial); United States v. Tucker, 404 U.S. 443 (1972) (resentencing required where prosecutor impeached defendant by questioning him about three prior felony convictions, two of which were invalid under Gideon); Loper v. Beto, 405 U.S. 473 (1972) (conviction overturned where defendant was questioned about four previous convictions, all invalid under

Gideon). Thus, in giving Gideon retrospective effect, this Court has consistently sought to erase the indirect adverse consequences traceable to violations of the principles of that decision. Full retroactivity means nothing less.

At least one court has granted, in a case similar to this one, the relief that Petitioner seeks. In State v. Baker, 81 Wash.2d 281, 501 P.2d 284 (1972), defendant was found guilty of first-degree murder and the jury requested that the death penalty be imposed. The trial judge, however, deferred imposition of the death penalty on condition that the defendant be imprisoned for life with no possibility for parole, a sentence not authorized by statute. Considering the case on appeal in light of the intervening decision of Furman v. Georgia, the Supreme Court of Washington invalidated the deferral and the imposition of no-parole life imprisonment and remanded for resentencing.

It is, of course, untenable to suggest, as the court below did, that the death penalty was never "imposed" on Schick because the sentence had not been ordered executed. It was imposed not only in the technical sense but in practical effect as well. Had it not been imposed, it could not have been commuted. The provisions of military law regarding execution of sentences simply parallel civilian procedures under which execution is stayed pending appellate review.[6/] Indeed, the Manual for

---

6/ The differences between the two stem primarily from the fact that appellate review in the military is automatic. The time at which a sentence may be ordered executed

(cont'd)

Courts-Martial, supra, repeatedly and explicitly states that a sentence is "imposed" when it is adjudged by the court-martial at trial. See, e.g., paras. 76a(2), (4), (5); 76b(1); 81d(1); 125; 126a, MCM, 1969 (Rev.). Paragraph 126, supra, deals specifically with limitations on the trial court's "imposition of the death penalty."

The effect of the lower court's ruling on petitioner -- who seeks not to be released, but only to be given the opportunity to be considered for parole -- is to penalize him uniquely. He is now in a worse position than all other prisoners upon whom death penalty had been imposed but not executed at the time Furman was decided. They now all come within the reach of applicable parole statutes. Had they, like Schick, been subjects of clemency in the form of commutation to no-parole life imprisonment, they would be in a worse position than they now are.

Allowing the decision below to stand would undermine the integrity of the judicial process by sanctioning a holding that fails to adhere to this Court's rulings in Furman v. Georgia and subsequent related cases. Although the no-parole condition found in this case was imposed by President Eisenhower in only six instances, resolution of the issue presented here would be significant precedent

---

(cont'd)

varies with the nature and severity of the sentence, which under military law determine the number of levels of appellate review to which the accused is entitled. 10 U.S.C. §§ 857, 858, 871 (Art. 57, 58, 66, 67, 69, 71, UCMJ); para. 88, 98-103, 110, MCM, 1969 (Rev.). See generally Moyer, Justice and the Military §§ 2-673, 2-750 to 2-808 (1972).

for other cases raising the question of whether retrospective application of a constitutional ruling will extend to lasting, though indirect, consequences of prior violations of that rule.

II.

The second question involves construction of an important constitutional provision, the Article II, Section 2 clause that empowers the President to grant "reprieves and pardons." This provision is the source of the President's power to commute sentences, as well as his authority to grant amnesty and remissions. Biddle v. Perovich, 274 U.S. 480 (1927). The issue here involves the limitations of the power to commute. Although limitations were clearly implied by early decisions of this Court, some confusion has been evident in recent lower court decisions, and commentators have suggested that the limits are uncertain. E.g., Humbert, The Pardoning Power of the President 47 (1941).

The question is substantial not only because of the inherent importance of this constitutional provision, but because it has served as the model for parallel provisions in numerous State constitutions. Ex parte Wells, 59 U.S. 307, 313 (1855). Delineation of the limitations on the power to commute would be especially timely since an inevitable consequence of the enactment of mandatory death sentences that has followed in the wake of Furman will be to increase demands upon Chief Executives to exercise their clemency power.

Commutation is the substitution of a lesser, different type of punishment for the punishment actually imposed. Schwab v. Berggren, 143 U.S. 442, 451 (1892); Biddle v. Perovich, supra, at 487.[7/] Historically, the President's power to commute derived directly from his Article II, Section 2 power to grant pardons. Ex parte Wells, supra, at 313-15; Biddle v. Perovich, supra. This power and the derivative power to commute sentences are by general agreement understood not to be without limits. Courts have frequently stated that the Chief Executive may attach any condition to a pardon so long as it is not "illegal, immoral, or impossible of performance." E.g., United States v. Six Lots of Ground, 27 Fed. Cas. 1097, 1098 (1872); Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937); Pardoning Power of the President, 41 Op. Atty. Gen. 251, 252 (1955).

7/ The concept of commutation as distinguished from pardon -- complete relief from the legal consequences of a conviction, including exemption from the punishment imposed -- is well-established in our jurisprudence. See Black's Law Dictionary 351, 1268-69 (4th ed. 1968); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833); Osborne v. United States, 91 U.S. 474, 477 (1875); Illinois v. Bosworth, 133 U.S. 92, 104-05 (1890); Lupo v. Zerbst, 92 F.2d 362, 364 (5th Cir. 1937); In re Conditional Discharge of Convicts, 51 A. 10, 13, 14, 73 Vt. 414 (1901); Application of White, 2 N.Y.S.2d 582, 166 Misc. 481 (1938); State v. Peters, 4 N.E. 81, 87, 43 Ohio St. 629 (1885); Whittington v. Stevens, 73 So.2d 137, 139, 221 Miss. 598 (1954); Ex parte Webbe, 30 S.W.2d 612, 615, 332 Mo. 859 (1929); State v. District Court, 237 P. 525, 527, 73 Mont. 541 (1925); Humbert, The Pardoning Power of the President 27 (1941); 59 Am.Jur.2d §§ 3, 7, 8.

Without adopting this formulation, it is sufficient to note that none of these sources of authority addresses the crucial question of what types of commutations are "illegal." Presumably, it would be illegal and beyond a President's constitutional power to "commute" a sentence to keel-hauling or to a $10,000 fine to be paid to the President's political party or to lifetime confinement to a monastery. Short of unlikely hypotheticals, however, what the precise limits of the President's constitutional power to commute are has not been clearly established. That is the question presented by this case.

Given the legality of the President's power to commute under Biddle v. Perovich, supra, the limits of this power must be -- as this Court has previously implied -- that a President may commute only to a punishment provided by law. If a President chooses to commute rather than to pardon, he may not impose some form of punishment foreign to the system of criminal law under which the prisoner was tried.

The most direct support for these limits comes, quite simply, from the meaning of the words themselves. The word "commute" means the substitution of a different, lesser form of lawful punishment. In Biddle v. Perovich, supra, the Solicitor General himself made clear that "commutation" extends, by definition, only to the substitution of a punishment provided by law. In his argument before this Court he explicitly stated that "[a] commutation is the substitution of a milder punishment known to the law for the one inflicted by the court." Id. at 483 (emphasis

added). Whether the President has absolute discretion in commuting a sentence is therefore beside the point; that discretion does not bestow upon him the power to do something other than commute. If a President substitutes some penalty not provided by statute for the sentence imposed, he is doing something other than "commuting" the sentence.

Secondly, this Court's decisions indicate unmistakably that commutation must be to a form of punishment provided by law. In Biddle v. Perovich, supra, this Court upheld the right of the President to commute a death sentence to life imprisonment and ruled that consent of the prisoner to such commutation was not necessary. Considering the lawfulness of the commutation at issue, Mr. Justice Holmes, speaking for a unanimous Court, stated: "The only question is whether the substituted punishment was authorized by law . . .." 274 U.S. at 487 (emphasis added). As noted in the preceding paragraph, the Government's view on this issue was the same. Id. at 483.

In requiring that the substituted sentence be one provided by law, the Court simply reiterated a limitation it had implied over seventy years before. In Ex parte Wells, 59 U.S. (18 How.) 307 (1855), this Court passed on the validity of a commutation from death to life imprisonment. Upholding the President's action, the Court acknowledged that the law imposed limitations on the exercise of the President's pardon power. The Court stated that

> the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies. . .. [Emphasis added.]

59 U.S. at 310.

Addressing the specific question of what these limitations were in the case of commutations (pardons with penal conditions), the Court made clear that the Chief Executive could not go beyond those punishments provided by law when commuting to a lesser punishment:

> So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided by legislation. [Emphasis added.]
>
> 59 U.S. at 313.

Authorities cited by the court below and by the 1955 Attorney General's Opinion upon which the court heavily relied provide no support for the contention that a President may commute to a sentence not provided by law. First, several lower court decisions cited involved not commutations, but pardons with non-penal conditions. Kavalin v. White, 44 F.2d 49, 50 (10th Cir. 1930); Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929); Lupo v. Zerbst, supra; Vitale v. Hunter, supra. Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), and Ex parte Weathers, supra, cited below in support of the legality of conditional commutations, both rely upon Ex parte Wells, supra, as their authority. However, at issue in Wells was not a conditional commutation, but a simple commutation styled as a "conditional pardon." Also cited by Weathers, supra, at 295 was United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833), which involved a simple pardon. In Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), the court upheld the commutation of a death sentence to life imprisonment on the condition that the sentence be considered to

run from the date of commutation. The court supported its conclusion by one conclusory sentence citing no authority. 223 F.2d at 588.[8/]

Of the four Supreme Court decisions cited below in support of conditional commutations, not one is in point. Except for Wells, discussed above, none involved a commutation. At issue in Semmes v. United States, 91 U.S. 21, 27 (1875), was a pardon with a non-penal condition. In the only relevant language, the Court simply noted that pardons may be "subject to conditions and exceptions . . .." United States v. Klein, 80 U.S. 128, 142, 147 (1871), dealt with a general post-Civil War pardon and amnesty and stated simply that pardons may be granted on conditions. In Ex parte Grossman, 267 U.S. 87, 107, 120 (1925), the Court upheld the President's action remitting part of a sentence upon condition that the remainder of the sentence, a fine, be executed.

Thus, the authorities relied on in the court's decision below and in the Attorney General's 1955 opinion

---

8/ The occasional disregard of the distinction between commutations and pardons with non-penal conditions may be traced to the close historical relationship of the two concepts and the fact that the power to commute derived directly from the power to pardon. The President's power to pardon was quickly held to include the power to pardon conditionally. E.g., United States v. Wilson, supra, at 160; Ex parte Wells, supra, at 313-15; Semmes v. United States, supra, at 27. It was an easy next step for the President to impose penal "conditions" on pardons, that is, to pardon on condition that the prisoner serve some lesser punishment. Although the Supreme Court discarded this semantic fiction in 1927 in Biddle v. Perovich, supra, the earlier overlapping usage of the terms "conditional pardon" and "commutation" has led a few courts to refer to all conditional pardons, including those with non-penal conditions, as "commutations." Such confusion is evident in some of the cases cited above.

furnish no support for the notion that a President may commute a sentence to some lesser form of punishment not provided by law. To the contrary, prior decisions of this Court touching upon this issue clearly indicate that when commuting a sentence a President must select the lesser punishment from those provided by law. To conclude otherwise would allow the President unilaterally to fashion and impose punishments of his own choosing.

The action taken in this case clearly transgressed these limitations. In place of the death sentence, Schick was given life imprisonment with no condition for parole. Such punishment is completely foreign to our system of law. Nowhere in the Uniform Code of Military Justice has Congress authorized such a punishment; under military law it is an unlawful sentence. Even under federal civilian criminal statutes -- to which Schick as a serviceman abroad was not subject -- such a punishment is nowhere to be found.

Nor may the President's action be saved by the language he chose to use. There is clearly no basis in logic or in law for distinguishing between a commutation to life imprisonment with no opportunity for parole and commutation to life imprisonment on the condition that the prisoner shall have no opportunity for parole. To attach legal significance to such a semantic distinction would be an unjustifiable elevation of form over substance.

Failure to grant this petition not only would represent an important departure from this Court's prior position with regard to limitations of the commutation

power, but would allow the Chief Executive in future cases to devise punishments of his own choosing and substitute them for sentences provided by law and imposed by trial courts.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

HOMER E. MOYER, JR.
ROBERT N. SAYLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

October 31, 1973

ACTION BY THE PRESIDENT OF THE UNITED STATES

In the general court-martial case of Master Sergeant Maurice L. Schick, RA 33 688 357, United States Army, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50, pursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause I, of the Constitution, the sentence to be put to death is hereby commuted to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of this action, and confinement at hard labor for the term of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 et seq., 10 USC 3662 et seq., 10 USC 871, 874), or any acts amendatory or supplementary thereof. As thus commuted, the sentence will be carried into execution. The prisoner shall be committed to the custody of the Attorney General.

Dwight D. Eisenhower

THE WHITE HOUSE
March 25, 1960

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

In the Board of Review, United States Army
Before
POTTER, GODDEL and BERNSTEIN
Members

CM 373879

UNITED STATES v. Master Sergeant MAURICE L. SCHICK, RA 33 688 357, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50.	CENTRAL COMMAND Sentence adjudged 27 March 1958. Approved sentence: To be put to death.

APPELLATE COUNSEL FOR THE ACCUSED:
William C. DeValle, Esquire
Lieutenant Colonel Harley A. Lanning, JAGC

APPELLATE COUNSEL FOR THE UNITED STATES:
Major Merle C. Ridcout, Jr., JAGC

DECISION

The accused was charged with premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice. He pleaded not guilty to the specification and the charge. He was found guilty of both and was sentenced to be put to death. The convening authority approved the sentence. No previous convictions were considered by the court.

The offense occurred at Sagamihara, a dependent housing project, near Camp Zama, Tokyo, Honshu, Japan, on 21 November 1953. The victim was Susan, the eight year old daughter of Colonel and Mrs. Jacquard H. Rothschild, an Army officer assigned to Army Forces Far East.

The evidence adduced by the prosecution establishes that on the afternoon of 21 November 1953 Susan visited with the daughter of Sergeant Clark L. Overton, who lived on the reservation in quarters 1148-c. Later in the afternoon at about 1705 hours, she left Sergeant Overton's quarters riding her bicycle towards home. She rode easterly

in the direction of a path running generally east and west across the area. This path was frequently used by the children in order to avoid the traffic on the roads. She was wearing a green polka-dot dress, a western style jacket and a white handkerchief, or scarf, on her hair.

At about the same time Susan started for home a soldier entered the area at Gate #2, asked the gate guard the time and proceeded westwardly along the path.

When Susan did not return home her father called Sergeant Overton inquiring if she was still at his home. When told that she had left, Colonel Rothschild asked Sergeant Overton to help him search for the little girl.

A short time later Colonel Rothschild found Susan's body lying face downward under water in a moat which runs parallel to the path. She had been gagged with her panties and the lower portion of her torso was bare. Her shoes were found nearby on the path. Her bicycle, facing eastward, was still leaning on its rest at a place about 8 feet south of the path and about 25 feet from where her shoes were found. Susan's white scarf was found on the path about four feet from her bicycle.

A medical examination, made soon after the discovery of the body, established that there were bruise marks and abrasions about Susan's neck, some swelling of her eyelids and blood in her trachea. An autopsy established that there was an increased amount of blood in most of the organs, particularly in the lungs and brain and a swelling in the voice box, trachea and lungs. The cause of death was established as asphyxia due to strangulation or possibly drowning.

After the prosecution had established the corpus delicti by competent evidence the signed pretrial statement of the accused was admitted into evidence as Prosecution's Exhibit #1 (R 237), without objection by defense counsel. Without going into details of the offense, it is sufficient to state that the accused admitted killing Susan by choking her and by placing her face down in the moat and by holding her head under water with his foot. Defense submitted no evidence on the merits of the case (R 240).

Defense raised the question of the mental capacity of the accused and prior to the submission of the case on its merits made various motions for continuances to permit psychiatric examination of the accused by civilian psychiatrists. After overruling a motion for an

indefinite delay, the law officer granted a continuance for the purpose of having accused examined by two qualified Japanese civilian psychiatrists. Prior to trial, a board of Army psychiatrist had been convened to examine and to determine the mental status of the accused.

The record of trial is replete with evidence concerning accused's mental responsibility at the time of the commission of the offense and at the time of trial. Suffice it to say that the Japanese doctors determined that accused was psychotic, either epileptic or schizophrenic (R 71) and that he was unable to distinguish right from wrong or to adhere to the right (R 69). The board of Army psychiatrists, on the other hand, diagnosed the accused as follows: Antisocial personality, chronic severe, with aggressive and sadistic tendencies, manifested by life-long disciplinary difficulties, inability to profit from experience, absence of real loyalties to persons, groups or codes, and in this case by egocentricity, grandiosity, a desire for competence, impulsive aggressive outbursts, excessive indulgence in alcohol, and a tendency to make and act upon his own laws (R 125-156, 163). The board members further determined that at the time of the commission of the offense, he could differentiate between right and wrong, could adhere to the right and that at the time of the trial he could understand the nature of the proceedings against him and intelligently conduct or cooperate in his own defense (R 126, 157, 164).

Prior to filing an assignment of errors, the civilian appellate defense counsel and the military appellate counsel filed with the board of review a motion requesting the board to direct that the accused be transported from Japan to the United States for further psychiatric examination. Subsequent to the filing of this motion defense counsel filed their assignment of errors.

Civilian defense counsel argued both the motion and the errors set forth in the assignment of errors at the same hearing before the board of review. He requested, that, as an alternative to the motion to return the accused for further psychiatric tests, the board of review forward the record of trial, containing the testimony of all the psychiatrists who examined the accused to the Surgeon General of the Army for an opinion concerning the mental responsibility of the accused. Pursuant to this request and in accordance with paragraph 124, Manual for Courts-Martial, United States, 1951, and Rule IX f 3 of the Uniform Rules of Procedure in and before the Boards of Review, the board forwarded the allied papers and the record of trial to the Surgeon General of the Army who subsequently returned the documents to the board of review stating that in his opinion

"a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

"c. The accused at the time of trial did possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

"d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

The instructions of the law officer concerning the elements of the offense charged and on the issue of the sanity were correct. The lesser included offenses were submitted to the court-martial under full, complete and appropriate instructions. The factual situation was decided by the court-martial adversely to the accused. There appears to be nothing of record to merit disturbing the finding and sentence of the court.

The board of review has given careful consideration to the assignment of errors filed by the appellate defense counsel and has heard extended oral argument in support thereof. The assignment of errors is considered without merit. The finding of guilty and the sentence are supported by the competent evidence of record.

For the reasons stated above the board of review finds the approved finding of guilty and the sentence correct in law and in fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

UNITED STATES v SCHICK

UNITED STATES, Appellee
v
MAURICE L. SCHICK, Master Sergeant, U. S. Army, Appellant

6 USCMA 493, 20 CMR 209

No. 6388

Decided November 18, 1955

On mandatory review. CM 373479, not reported below. Remanded.

William C. DuValle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Lieutenant Colonel James M. Scott* and *Lieutenant Colonel Harley A. Lanning.*

Major Merle C. Rideout, Jr., argued the cause for Appellee, United States. With him on the brief was *Lieutenant Colonel Thomas J. Newton.*

Opinion of the Court

ROBERT E. QUINN, Chief Judge:

A general court-martial in Tokyo, Japan, tried, convicted, and sentenced the accused to death for the premeditated murder of eight-year-old Susan Rothschild. Intermediate appellate authorities affirmed the accused's conviction and sentence, and the case was forwarded to this Court for review. Article 67(*b*)(1), 50 USC § 654.

After the appeal was assigned for argument in this Court, appellate defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance, for the purpose of obtaining a psychiatric examination of the accused by a civilian psychiatrist. We granted a continuance and directed that the findings of the phychiatrist be reported to this Court.

A team of staff psychiatrists and psychologists of the Menninger Clinic examined the accused. Their report says that, in their opinion, the accused was unable to adhere to the right with regard to the offenses charged at the time he committed the crime. They also indicate that they consider the accused "at this time, permanently and incurably ill."

Headnote 1

Once an accused has had a fair opportunity at the trial level to litigate the issue of his mental responsibility for an offense and his capacity to stand trial, those issues should, on appeal, be accorded the same treatment as all other contested matters. We mean that the question should not be tried *de novo* at every appellate level. A day in court means one fair and just trial of contested issues, and, when that has been granted to an accused, he does not have a right to a second trial in an appellate forum.

Headnote 2

The unusual circumstances here which prompt us to permit further consideration of accused's sanity merit enumeration. This accused has been sentenced to death for the commission of an atrocious crime. He was tried in Japan where the only civilian medical experts available to him were Japanese. One of the psychiatrists was obliged to testify through an interpreter, and, thus, he may have labored under a rather severe handicap in his ability to convey his findings to the court-martial. Both medical witnesses had a minimum of time to conduct their examinations, and they indicate that during the trial they were handicapped in the development of the bases for their conclusions.

In view of the Menninger report, and the circumstances set out above, we remand the case to the board of review for reconsideration of the question of the accused's sanity. United States v Bell, 6 USCMA 392, 20 CMR 108; United States v Washington, 6 USCMA 111, 19 CMR 240. The board of review will evaluate that report in conjunction with the evidence in the record and with such other psychiatric evidence as it may obtain in an investigation of its own if

it considers such investigation necessary or desirable. United States v Burns, 2 USCMA 400, 406, 9 CMR 30. In taking this action we are not holding out to accused persons the hope that this Court will require boards of review to become trial forums. Only when a situation is as unusual as this can we be asked to exercise our discretion.

Headnote 3

A procedural matter of some significance merits comment. This case reached the Court on mandatory review. As previously noted, appellate defense counsel moved to remand the case to a board of review or, in the alternative, for a continuance until a psychiatric examination could be made and a report filed in this Court. This prayer for relief was unusual. We entertained the motion because of the special circumstances earlier enumerated, and we granted a continuance. After the psychiatric report was received by the Court, the issue was set down for oral argument. Counsel for both parties appeared and in open court indicated that they were prepared to and would argue both the motion to remand and the errors raised on appeal. They were permitted to do so. Consequently, if this case again reaches this Court, no additional arguments will be heard, unless it clearly appears that questions are raised by the decision of the board of review which were not in issue at the time of argument.

To avoid any possible misunderstanding, it should be understood by the board of review that our reference to unusual circumstances is for the purpose of emphasizing that this case is *sui generis*. We express absolutely no opinion on the merits of the accused's defense of insanity. The board of review should consider the entire record, including the recently submitted report, uninfluenced by any proceeding before this Court, or by the procedure directed by us. The responsibility for making appropriate factual findings rests solely with the members of the board of review.

Judges LATIMER and BROSMAN concur.

UNITED STATES v SCHICK
(CM 373479 (recon))

UNITED STATES
v
Master Sergeant MAURICE L. SCHICK, RA 33688337,
Detachment Army Medical Service, United States
Army Hospital, 8169th Army Unit, APO 50

CM 373479 (recon)*

Sentence adjudged 27 March 1954. Approved sentence: To be put to death.

Appearances: Mr. William C. DuValle, Mr. Harlow M. Huckabee, Lieutenant Colonel James M. Scott, JAGC, appellate counsel for the accused; Captain M. Douglas Hodges, JAGC, appellate counsel for the United States.

* Original decision by board of review not reported below.

DECISION ON RECONSIDERATION

Upon original review of the record of trial in the instant case the Board of Review by its decision dated 30 November 1954 affirmed the approved findings of guilty of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, and approved the death sentence.

Since this case involves a sentence to death, a mandatory appeal was taken to the United States Court of Military Appeals. Article 67(*b*)(1), Uniform Code of Military Justice. Subsequent to the filing of the appeal and prior to argument on the merits, appellate defense counsel moved the Court to remand the case to the Board of Review, or, in the alternative, for a continuance for the purpose of obtaining a psychiatric examination of the accused by a civilian psychiatrist. The Court granted the continuance and directed that the findings of the psychiatrist be filed with the Court. In compliance with the order of the Court the accused was examined by psychiatrists and psychologists of the Menninger Clinic, who submitted their findings to the Court by a comprehensive report dated 19 August 1955. On 6 October 1955 arguments by counsel were heard and the case was submitted to the Court.

By order dated 30 November 1955, the United States Court of Military Appeals remanded the case to The Judge Advocate General of the Army for reference to the Board of Review for further review in accordance with the Court's opinion dated 18 November 1955 (United States v Schick (No. 6388), 6 USCMA 493, 20 CMR 209). On 6 December 1955, The Judge Advocate General returned the case to the Board of Review for further action in accordance with the mandate of the Court. Subsequent to said reference, oral arguments by appellate defense and Government counsel on the question of the sanity of the accused were heard.

Pursuant to Rule IX F 3, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, a Board of Review is empowered to consider matters outside the record of trial with respect to matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice. Consequently this board will receive and evaluate all matter concerning the mental responsibility of the accused obtained subsequent to the prior decision of this board.

Headnote 1

The report of the Menninger Clinic concludes as follows:

"A. The subject is suffering from a definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and antisocial to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and realty, impulsive aggressive behavior, with egocentricity and fantasies of omnipotence.

External Precipitating Stress: Unknown

Predisposition: Severe; lifelong pattern of anti-social behavior.

Degree of Impairment: Severe; requires hospitalization.

"B. The actual murder itself was senseless, from any rational point of view, but was related in many irrational ways to patient's pathological thinking and feeling. It was definitely a product of the illness and the culmination of the gradual decompensation of a chronically sick person.

"C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

This report was forwarded to The Surgeon General of the Army for his opinion as to the accused's mental responsibility. His opinion, dated 9 January 1956, is as follows:

"3. After reconsideration of the records available on 12 November 1954 at the time of his first review and consideration of the new medical studies and opinions presented in the Menninger Clinic Report, Doctor Guttmacher's letter, and reports from the United States Disciplinary Barracks, Fort Leavenworth, The Surgeon General continues to concur in the diagnosis of a character and behavior disorder as set forth in the Board of Medical Officers convened at the United States Army Hospital, 8167th AU, APO 1055, San Francisco, California, dated 19 January 1954 and 6 February 1954. With particular reference to the questions asked in paragraph 3, Comment No. 1, TJAG, 15 December 1955, The Surgeon General is of the following opinion:

a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

c. The accused at the time of trial did possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

Subsequently all of the reports and testimony herein referred to were submitted by appellate defense counsel to Dr. Winfred Overholser for his study and opinion. By a report dated 21 January 1956, he stated:

"However, even with all the psychiatric defects of the present 'tests,' it is my considered opinion that Schick is entitled to a verdict of acquittal by reason of insanity."

Our prior decision set forth the evidence at the trial level concerning the commission of the offense, the diagnosis of the Japanese doctors employed by the defense and the diagnosis of the Board of Army psychiatrists. The substance of the testimony of the Japanese doctors was that the accused was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish right from wrong or to adhere to the right. The Army Board of psychiatrists' conclusions and diagnosis was that:

"(1) The clinical psychiatric diagnosis is antisocial personality.

"(2) The accused knew at the time of the alleged offense that the act was wrong.

"(3) The accused was able at the time of the alleged offense to adhere to the right.

"(4) His intelligence level is bright normal, with an intelligence quotient of 115.

"(5) He was not drunk at the time the alleged act was committed. He was drinking prior to that time but did so voluntarily. He is not a chronic alcoholic or a victim of an alcoholic psychosis. He did not have 'pathologic intoxication.'

"(6) He understands the nature and seriousness of the charges. He is mentally capable of cooperating in his own defense.

"(7) He was capable of forming the degree of intent, willfulness, malice and premeditation called for by the nature of the offense charged.

"It was the unanimous conclusion of the Sanity Board that the patient, M/Sgt Maurice L. Schick, is now, was in the past, and was at the time of the commission of the alleged offense, entirely sane, competent and responsible for his actions, able to differentiate between right and wrong, and able to adhere to the right. He has a history of life-long maladjustment, rebellion towards superiors, and resentment toward authority, all of which reflect poor interpersonal relationships in his family, resentment of his parents' restrictions and his eldest brother's superiorities, delinquent and non-conforming behavior, and on a number of occasions, incredibly antisocial homicidal acts. These latter have been consistently rationalized and justified in the patient's mind by invoking his own special set of moral standards. It is therefore true beyond any doubt that this man is abnormal. It is by the nature of our social organization abnormal to kill other members of the society except when one's own life is threatened or in some similar conventionally accepted situation. Like any antisocial personality, this man, while grossly abnormal, is not insane. The difference does not consist of a finely shaded definition. This patient was capable of forming an intent and of acting in a complex, carefully thought-out way on the basis of his intent. No profound change has occurred in his personality or character and no such change is likely to occur. He is therefore at this moment essentially the same as he was when he allegedly killed Susan Rothschild . . . . He is considered to be a menace to society and because his behavior is not the result of a transient personality disorder or a transient or curable mental disease, it is the considered opinion of this Board that he will throughout his life continue to be a menace to society. It is strongly recommended, whatever the findings of the court in this case and whatever the sentence in the event of conviction, that steps be taken to segregate this man from society to prevent the repetition of his confessed homicidal acts. Since this man is not psychotic, he cannot be committed to an institution for the mentally ill."

On 2 November 1954 the record of trial and trial level psychiatric reports were submitted to The Surgeon General of the Army for his opinion as to the mental responsibility of the accused at the time of the commission of the offense and at the time of trial. He replied, on 12 November 1954, stating that he concurred in the diagnosis, findings, conclusions and recommendations of the Board of Medical Officers who had previously examined the accused.

The Menninger report, the latest opinion of The Surgeon General, including the inclosures thereto, and Dr. Overholser's opinion, dated 24 January 1956, is the only additional evidence not considered by the Board of Review in its original review of the record of trial and in arriving at its prior decision. This evidence is substantially the same as that considered and evaluated by the court-martial at the trial which was decided adversely to the accused.

The question now presented for consideration is whether the report of the Menninger Clinic and Dr. Overholser's opinion, when weighed and evaluated with the testimony of the witnesses at the trial, and the opinions of The Surgeon General, dated 12 November 1954 and 9 January 1956, are sufficient to raise a reasonable doubt in the minds of the members of the board as to the accused's sanity. It is the opinion of the Board of Review that the reports of the Menninger Clinic and Dr. Overholser disclose no essentially new facts not previously known to the court-martial, which as the finders of the facts saw and heard all the evidence, including that of the Japanese psychiatrists and the Army psychiatrists, and, under proper instructions from the law officer, resolved the issues against the accused.

Headnote 2

The Board of Review is under no compulsion to accept the above reports as a matter of law. United States v Kunak (No. 3797), 5 USCMA 346, 17 CMR 346. The United States Court of Military Appeals in that case said:

". . . While the evidence last obtained was contrary to other expert testimony in the record, we cannot say that the board of review was compelled to accept it as a matter of law . . . .

". . . The latest acquired evidence merely created a disputed question of fact which, under the provisions of the Code, the board was permitted to resolve. Its decision is not subject to reversal if there is substantial evidence to support it. . . ."

The Board of Review believes that the following statement from Holloway v United States, 148 F2d 665 (App DC, 1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507, is apropos of this case:

"And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. . . .

". . .

". . . To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (p 667)

Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts.

For the reasons stated, upon reconsideration the Board of Review finds the findings of guilty and the sentence as approved by proper authority correct in law and fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

GOLDEL, STEELE and BERKOWITZ, Judge Advocates. 20 February 1956.

UNITED STATES v SCHICK

UNITED STATES, Appellee
v
MAURICE L. SCHICK, Master Sergeant, U. S. Army, Appellant
7 USCMA 419, 22 CMR 209

No. 6388

Decided December 7, 1956

On mandatory review. CM 373179, original decision not reported below; decision on reconsideration reported below in 21 CMR 343. Affirmed.

William C. Duralle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Harlow M. Huckabee*, Esq., and *Lieutenant Colonel James M. Scott*.

Captain Thomas J. Nichols argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel Thomas J. Newton, Major Merle C. Ridcout* and *Captain M. Douglas Hodges*.

Opinion of the Court

HOMER FERGUSON, Judge:

The accused was convicted by general court-martial of the premeditated murder of eight-year-old Susan Rothschild at Tokyo, Japan, in violation of Article 118, Uniform Code of Military Justice, 50 USC § 712. He was sentenced to death. On May 10, 1954, the sentence was approved by the convening authority. The board of review, by decision dated November 30, 1954, affirmed and approved the death sentence. A mandatory appeal, under Article 67(*b*)(1), of the Uniform Code of Military Justice, 50 USC § 654, was taken to this Court. After the appeal, and prior to argument on the merits, appellate defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance for the purpose of obtaining a civilian psychiatric examination of the accused. This Court granted the continuance and directed that additional findings of the psychiatrist be filed with the Court. The accused was examined by psychiatrists and psychologists of the Menninger Clinic, who submitted their findings by a well-written and comprehensive report dated August 19, 1955. Arguments were heard by counsel on October 6, 1955, and the case was submitted to the Court. By an opinion decided on November 18, 1955 (6 USCMA 493, 20 CMR 209), the Court remanded the case to The Judge Advocate General of the Army for reference to the board of review for additional review with respect to a reconsideration of the accused's sanity. The case was returned to the board of review and oral arguments by the defense and Government counsel were heard on the question of sanity. By decision, dated February 20, 1956, the board of review again affirmed the findings and sentence. Following the final board of review decision the accused filed a supplemental brief listing additional assignments of error. The case was then reargued before the full Court.

The pertinent issues now before the Court are:

1. Whether the law officer erred in refusing to grant further time for additional psychiatric study.

2. Whether the use of the Army Technical Manual (Tech Manual) TM 8-240, Psychiatry in Military Law, by the court-martial and the board of review precluded its exercise of independent judgment.

3. Whether the law officer's refusal to instruct as requested on the effect of partial mental deficiency upon the ability of the accused to premeditate was prejudicial, and therefore requires a rehearing.

4. Whether the board of review applied the rule cited by it in its opinion that "To justify a reversal circumstances must be such that the verdict shocks the conscience of the court," and therefore committed reversible error.

The record discloses the following facts: During the early evening hours of November 21, 1953, the lifeless body of eight-year-old Susan Rothschild was found by her father. It was lying face down in a moat at Camp Zama, Japan. A medical examination revealed that death had been caused by strangulation or drowning less than an hour earlier. Six days later, to agents of the Criminal Investigation Division of the Army, the accused confessed that he had met Susan, talked with her about ten minutes, and then, as she turned to leave "I grabbed her and choked her." After choking her, he gagged her with her "panties" and dragged her into a ditch. [illegible] held her face under the water. The accused had been drinking since about noon that day. The reason for the homicide was "just that she was there." After the deed was done, he experienced a sexual release.

The accused was charged with premeditated murder and the only issue raised before and during the trial was that of sanity. Upon each occasion counsel for the accused attempted to obtain psychiatric examination of the accused by nonmilitary American doctors. Although his efforts with respect to American doctors were unsuccessful, he did succeed in obtaining the services of two Japanese psychiatrists. They were Dr. Takeo Doi, Department of Neuro-psychiatry, Tokyo University Medical School, and Dr. Susumu Hayashi, Superintendent of the Tokyo Metropolitan Matsurawa Mental Hospital. Both testified at the trial that they had examined the accused, along with all pertinent records relating to his mental responsibility, and, in their opinion, at the time of the offense he was suffering from schizophrenia, and he could neither distinguish right from wrong nor adhere to the right.

Four Army psychiatrists testified for the prosecution. All had examined the accused and had studied [illegible] regarding his mental capacity. Each

testified that the accused was, in his opinion, suffering from a nonpsychotic behavior disorder and accordingly was able at the time of the offense to distinguish right from wrong, to adhere to the right, and at the time of the trial was able to understand the nature of the proceedings against him and cooperate intelligently in his defense.

The additional evidence on the accused's sanity considered by the board of review and now before us is (1) A psychiatric and psychological report from the Menninger Clinic, which classified the accused as suffering from:

> ". . . [A] definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and anti-social to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and reality, impulsive aggressive behavior, with egocentricity and fantasies of omnipotence.
>
> . . . . .
>
> "C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

The report concluded,

> "Yet, regardless of any disagreement about how sick he is between excited episodes, it seems clear that the offense arose during, and was a manifestation of, an acute psychotic episode. There is a definite history of similar episodes prior to the offense, and the examination reveals, in minature [*sic*], the kind of pathology that can be easily and sometimes unpredictably precipitated into violent episodes. In our opinion, these episodes will recur in the future. Unfortunately, present day psychiatric treatment techniques offer nothing for this man, and we would have to consider him, at this time, permanently and incurably ill. As psychiatrists, we simply have to say that this man is dangerous to society, and will remain so for many years, probably all of his life. He should not be released to society unless there is clear cut evidence of major change for the better in those pathological psychological processes demonstrated to be present."

(2) A statement, based upon the trial record and medical reports, from Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D. C., wherein he announces the opinion that it is doubtful whether the accused could distinguish right from wrong at the time of the offense; however, he has no doubt but what the accused was *unable* to adhere to the right and could not have premeditated with regard to the offense charged. But the accused *could* understand the nature of the trial and appellate proceedings against him; *could* cooperate intelligently in his defense; (3) A statement from Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, Maryland, in which he notes that the accused's conscious controls are profoundly affected by alcohol. Dr. Guttmacher did not, however, designate the accused as being a paranoid schizophrenic, but rather as suffering from "profound character neurosis, with periods of psychotic-like behavior, particularly when imbibing alcohol." He "inclined" toward the view that the accused was able to distinguish right from wrong but was *unable* to adhere to the right. He points out that in this area judgments are extremely difficult to make and if present military medical criteria were applied, the accused should "probably be considered responsible"; (4) A report from The Surgeon General of the Army, dated

January 9, 1956, in which he reviews the Menninger Report and previous material relating to the sanity of the accused. In the opinion of The Surgeon General, the accused could distinguish right from wrong, could adhere to the right, and possesses sufficient mental capacity to understand the nature of the proceedings against him.

After reviewing the additional information as to the accused's sanity, the board of review again
Headnote 1 found the accused mentally responsible for his acts. The conviction was affirmed. There was substantial evidence to support the board's finding, and, therefore, this Court cannot find that as a matter of law the board erred. United States v Bunting, 6 USCMA 170, 19 CMR 296.

The accused argues that his rights were prejudiced by the refusal of the law officer to allow him
Headnote 2 time for additional psychiatric study. Perhaps it would have been more appropriate to have granted the accused additional time for examination by the Japanese psychiatrists, but we cannot say that under the circumstances of this case the accused did not have sufficient time to prepare his defense. From December 1, 1953, to February 6, 1954, a board of medical officers examined the accused, and their report was sent to the defense counsel on February 9, 1954. On the same date the defense counsel requested the commanding officer to send the accused to Topeka, Kansas, to be examined by the Menninger Clinic. February 16, 1954, the defense was informed that its request would not be complied with. However, Government facilities, records on the accused, and Government psychiatrists were available to the accused and counsel. On March 16, 1954, counsel for the accused asked for a month's continuance in order to obtain a deposition from Dr. Menninger. This motion was denied. Counsel then moved for an indefinite continuance for time to bring —if possible—Drs. Menninger, Kezal, or Overholser to Japan. This motion was also denied but a continuance was granted for one week to secure Japanese psychiatrists. The defense moved again on March 22, 1954, for a continuance in order to obtain the presence of Dr. Overholser as a material witness; however, the defense could furnish nothing definite with respect to whether, if ever, Dr. Overholser would be available in Japan. An additional continuance for two days was granted. We note that the Japanese psychiatrists stated that in their opinion the accused was not responsible for his acts. That being so, and from all the facts we cannot find the rulings of the law officer to be as a matter of law reversible error. In any event, the determination as to whether the request for a continuance should or should not have been granted rested within the sound discretion of the law officer. Under the circumstances of this case we cannot say that he abused that discretion. See United States v Knudson, 4 USCMA 587, 16 CMR 161.

The accused also argues that he was prejudiced because use of the Department of Army Technical Manual, TM 8-240, Psychiatry in Military Law, by the court-martial and board of review, precluded their exercise of independent judgment. In this connection we announce that at most the
Headnote 3 "Tech Manual" occupies the position of a text book or treatise on the subject of insanity. (See opinion of Chief Judge Quinn, United States v Kunak, 5 USCMA 346, 17 CMR 346.) It is not competent evidence of either the facts or opinions advanced by the authorities. It may be used to a limited extent in connection with the testimony of an expert witness, but it does not have any independent probative value. A study of the record in this case now
Headnote 4 before us makes it abundantly clear that all the psychiatrists who testified at the trial arrived at their respective conclusions from an independent evaluation of many factors taken from numerous sources and the witnesses appeared to be completely unfettered by the "Tech Manual." As a matter of fact, there is no mention of this Manual throughout the trial. All of the psychiatric testimony for the Government was to the effect—without equivocation—that

the accused knew what he was doing at all times, could distinguish right from wrong and adhere to the right as to the offense charged. And at no place in the law officer's instruction did he advert to the "Tech Manual" or call the court's attention thereto.

During an out-of-court conference the accused requested the following instruction: "There is other evidence in this case which you may properly weigh with the evidence of voluntary intoxication in determining the accused's reasoning ability, such as the history of impulsive aggressive outbursts described by various witnesses before this court and the mental status of the accused as described by the expert witnesses." The accused assigns as error the refusal of the law officer to give this instruction on partial insanity as affecting premeditation. Although the law officer refused the requested instruction he gave instead, "In the light of all the evidence, if you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder you must find him not guilty of that offense." The law officer felt that this instruction adequately covered the effect of partial insanity on premeditation. During the out-of-court conference, he stated, "I am not going to give your proposed instruction . . . I believe my instruction is sufficient to cover all that without enumerating the evidence." In United States v Smith,
Headnote 5 5 USCMA 314, 17 CMR 314, the trial court was given an almost identical instruction. This Court held, "This instruction adequately informed the court of the possibility of partial responsibility—and a consequent finding of unpremeditated murder. Thus, no error inheres in the *finding* of premeditated murder. Cf. United States v Kunak, supra." Also see United States v Higgins, 4 USCMA 143, 15 CMR 143. Moreover, the requested instruction in the instant case was somewhat similar to the instruction requested by the defense in United States v Dunnahoe, 6 USCMA 745, 21 CMR 67. As set out in that case, the pertinent portions of the requested instruction read:

"'There is other evidence in this case which you may properly weigh with or against the evidence of voluntary drunkenness in determining the accused's reasoning ability, such as the evidence of the accused's muscular coordination immediately before and immediately after the alleged offense, the accused's ability to speak coherently shortly after the offense, the accused's apparent lack of concern for himself shortly after the alleged offense, the accused's failure to conceal the body of the alleged victim, the accused's failure to obtain or conceal certain real evidence which tended to connect him with the alleged offense, the accused's statements to fellow soldiers made shortly after the alleged offense, and the accused's ability later to remember certain of the details surrounding the alleged offense.

"'If, in the light of all the evidence, you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, you must find him not guilty of that offense.'"

This Court stated, after inspection of the quoted portions of the instruction (exclusive of the second paragraph, which was considered sufficient to meet the standards of partial insanity in Smith, supra, and Kunak, supra), that:

". . . The vice of the requested instruction is that it singles out bits of evidence and emphasizes them to the exclusion of others. An accused may not isolate particular facts of the case favorable to him and demand that the law officer give undue prominence to them. Neither may he, by suggesting some facts, require the law officer to summarize every fact for or against every issue. United States v Harris, 6 USCMA 736, 21 CMR 58."

It was precisely for this reason that the requested instruction was refused in the case now before the Court. When the requested instruction was proffered

by the defense, the trial counsel objected as follows:

> ". . . I should like to suggest in reference to what counsel has offered that if there is to be any reference to specific evidence then all of the specific evidence which might be considered upon the issue should also be referred to and that in any event it should always be said in any instruction that this and all other evidence in the case touching upon these issues are what you should consider in arriving at your findings."

Likewise, here, the law officer—in line with the Court's reasoning, later reflected in Dunnahoe, supra—apparently concluded that the defense counsel was asking him to "single out bits of evidence and emphasize them to the exclusion of others," and feeling that he was going to give an instruction which would be sufficient as to the effect on premeditation of mental deficiency short of insanity, refused the instruction with the remark that, "I believe my instruction is sufficient to cover all that without enumerating the evidence." The better practice would have been for the law officer to have specified the circumstances bearing upon the problem here. But we are of the opinion that his failure so to do did not prejudice the accused. The law officer's instructions, taken as a whole, were adequate. In passing, we note that appellate defense counsel complains of the definition of "irresistible impulse" given by the law officer at the trial. Portions of this instruction were discussed in an out-of-court hearing and certain modifications were made at the defense counsel's request. After the modifications, counsel for the accused voiced no additional objections to this part of the law officer's instruction. As given, the instructions on irresistible impulse follow the Manual.

Headnote 6

The accused maintains that his rights have been prejudiced by the board of review by applying an appellate rule that "to justify a reversal circumstances must be such that the verdict shocks the conscience of the court." This, of course, is not the proper test which should be applied by a fact-finding tribunal and if the board in fact applied such a test, it would be error. However the foregoing language was tacked on to another quotation by the board which had to do with conflicting psychiatric testimony. The entire quotation was taken from Holloway v United States, 148 F2d 665 (CA DC Cir) (1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507. The quoted portion applies to the Federal courts which have no fact-finding powers. But, the board of review here had fact-finding powers and therefore this language has no application to it. Article 66, Uniform Code of Military Justice, 50 USC § 653. Following the quotation from the Holloway case, supra, the board concluded its opinion, with the following terminal paragraph:

Headnote 7

> "Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts."

Clearly the board of review did not apply the quoted language to its finding for it is apparent from the board's own language that it concluded, after studying all the evidence, that the guilt of the accused had been established beyond a reasonable doubt.

We have reviewed the record of trial with care. The accused was represented by two attorneys, then in uniform, now in the civilian practice of law, who were competent trial lawyers, and they guarded the rights of their client with commendable force and vigor. The court-martial under proper instructions on the law decided the issue of fact against the accused. The board of review with its fact-finding powers has also decided the issue against the accused. We find no errors of law which prejudiced the substantial rights of the accused.

The decision of the board of review is affirmed.

Chief Judge QUINN concurs.

LATIMER, Judge (dissenting):

I dissent.

This is a most difficult case to decide objectively because we are faced with a beastly and senseless crime committed against a child of tender years. Nonetheless, the accused is one whose mental processes have, by any medical yardstick, been impaired. There is practically no dispute in the facts, for the killing is admitted, the accused's medical history is not controverted, and the evidence upon which the experts base their opinions is settled. The real dispute concerns the conclusion to be drawn from the medical evidence, for the expert witnesses are divided sharply on accused's mental condition and the issue of his responsibility for the offense. However, there are certain matters upon which they agree. Some five or more civilian psychiatrists and six or more military psychiatrists have participated in this case and they are unanimous in the conclusion that, regardless of the nature of accused's illness, he is dangerous to society, will remain so for many years, and should not be released from confinement unless there is clear and positive evidence of a major change for the better in his pathological and psychological processes. In addition, they agree that the accused suffers from some illness which may at times affect his mental processes. The military psychiatrists diagnose his condition as a character disorder, while most of the civilian experts arrive at the conclusion that he has psychotic episodes and that the killing probably occurred during one of those periods. Lastly, the experts agree that, regardless of how the illness is catalogued or characterized, it has existed for some time and it is a part of accused's lifelong pattern of behavior.

Headnote 5

It would serve no real purpose were I to set out the facts underlying the various conclusions reached by the experts. It is enough to say that those experts from the civilian community who testified or otherwise submitted their opinion are recognized as some of the outstanding psychiatrists in America, and they presented powerful reasons to justify their opinions that accused was insane at the time of the offense and not mentally responsible for the crime. On the other hand, military medical experts gave good reasons to support their unanimous conclusion that the accused, while suffering from a chronic, severe anti-social personality, with aggressive and sadistic trends, was sane at the time of the offense and legally responsible for its commission.

Our task would not be difficult if we were faced only with a dispute in the evidence or the inferences to be drawn therefrom, for if that were the gist of the controversy, we could solve the problem by merely saying that we do not have fact-finding powers, that two fact-finding agencies have resolved the issues against the accused, and that we are powerless to interfere. But we are faced with an instructional infirmity, and, in the light of the evidential posture of this case, I believe that deficiency is sufficient to undermine the findings of premeditated murder.

I agree that the law officer instructed the court-martial members that if, in the light of all evidence, they had a reasonable doubt the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, they must find him not guilty of that offense. Such language may be found within this cold record, but that is not the full story, for it was preceded by other instructions which must have had a tendency to becloud the issue and confuse the court members. Certainly, if that statement was fully and fairly understood by the court members to mean that accused's mental state, regardless of the diagnostic label, could

be considered in determining his mental capacity to premeditate, then I would concur with my associates. However, my perusal of the record forces me to conclude that the members of the court-martial were not told informatively how to consider a condition which, if the Government's witnesses were to be believed, might have prevented the accused from premeditating, but which would not, under their view, relieve the accused of criminal responsibility for the homicide. Very briefly, I will mention my reasons for that conclusion.

The instruction referred to in the Court's opinion is quoted as it appears in the record. It there appears on the page as a separate paragraph, but it was given immediately following an instruction on intoxication. The instruction on that subject deals with its effect on premeditation, but any reference to the effect which a mental condition less than insanity, such as a character or behavior disorder, as those conditions are defined in military publications, might have on that element are singularly missing. More to the point, the instructions on insanity, without some sort of additional explanation, would lead a court member to believe that the accused's mental condition could only be considered if it amounted to legal insanity, and then solely for the purpose of determining whether the accused was to be relieved of criminal responsibility for the principal offense and all included offenses.

In dealing with the issue of insanity, the law officer gave the usually accepted instructions previously found in military cases. He used the right and wrong test in conjunction with the irresistible impulse theory. In dealing with the ability to adhere to the right, he specifically informed the members of the court that before that hypothesis could be used, it was necessary that there be a total impairment of the ability to adhere to the right and that something less than that did not suffice to meet the standards of military law. In addition, he informed the court-martial members that an irresistible impulse must be an insane, irresistible impulse, that is, an irresistible impulse resulting from a disease of the mind as distinguished from moral insanity, for he said that moral insanity, strictly speaking, is not insanity at all. Furthermore, he continued on to say that, for practical purposes, inability to adhere to the right occurs only in psychotics and that a mere defect of character, willpower, or behavior, as manifested by ungovernable passion or otherwise, does not necessarily indicate a lack of mental responsibility, even though it may demonstrate a diminution or impairment of the ability to adhere to the right. This is all very well when discussing the question of whether the accused is to be absolved of all criminal responsibility, but the thrust of those instructions is away from any theory that something less than psychosis can be considered by the court for any purpose. If the court-martial members understood the instruction in the manner in which I have interpreted it, then they would have to conclude that if the accused was psychotic he could be found not guilty, but that any impairment of the mental processes which did not reach that level of severity could not be considered at all. If such was the case, then the accused was prejudiced for, while the record would support a finding that he was legally sane, the medical evidence is also clearly sufficient to support a finding that his mental condition prevented him from premeditating the commission of this senseless crime. Surely this man was placed by the evidence in a category such that his illness must be considered in its relationship to both criminal responsibility and to the element of premeditation. The first was covered adequately by the instructions, the second not really at all.

In the recent case of United States v Dunnahoe, 6 USCMA 745, 21 CMR 67, I set out the reasons why I believed that well-recognized conditions which are characterized by some psychiatrists as character disorders and others as mental defects or derangements could be considered by court-martial members for the purpose of determining whether they affected the mental processes of an accused to such an extent that he could not premeditate. In that case I was not prepared to say—nor do I at this

time believe—that these disorders should be permitted to exculpate a person for the commission of a crime, but I have reached the conclusion that so long as the record shows a fair probability that the condition of an accused's mind is affected by some illness, even though he is not psychotic, the court-martial members should be instructed that they may consider it in ascertaining whether he actually could or did premeditate.

It may well be that my views on this particular issue will not become part of military law, but if a fair trial is to be assured when the life of an accused is at stake, it is necessary that law officers inform court members in clear and unmistakable language that they may consider any evidence in the record which casts light on the issue of premeditation, and that that evidence should not be excluded from consideration merely because medical experts disagree over its diagnostic label.

I would return the record to The Judge Advocate General of the Army for reference to a board of review, either to affirm a finding of guilty of unpremeditated murder and an appropriate sentence, or to grant a rehearing.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1508

MAURICE SCHICK, Appellant

v.

GEORGE J. REED, Chairman of the United States Board of Parole, et al.

Appeal from the United States District Court for the District of Columbia

---

Decided July 23, 1973

Caryl S. Coie, with whom *Robert W. Sayler* was on the brief, for appellant.

James W. Diehm, Assistant United St es Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Michael A. Katz*, Assistant United States Attorneys, were on the brief, for appellees.

Before: WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBB.

Dissenting opinion filed by *Circuit Judge* WRIGHT, at p. 7.

ROBB, *Circuit Judge:* In 1954 the appellant Schick, a master sergeant in the United States Army, was convicted by a court-martial of the premediated murder of an 8-year old girl, in violation of Article 118 of the Uniform Code of Military Justice. 10 U.S.C. § 918 (1970).[1] The court-martial sentenced Schick to death. In 1960 President Eisenhower commuted the sentence to a dishonorable discharge and imprisonment for life upon the express condition that Schick should "never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 *et seq.*, 10 U.S.C. 3662 et seq., [sic] 10 USC 871, 874), or any acts amendatory or supplementary thereof." Schick was thereafter committed to the custody of the Attorney General and is now confined in the United States Penitentiary at Lewisburg, Pennsylvania. The United States Board of Parole has declined to consider him for parole although in the absence of the condition attached to the President's commutation he would be eligible for such consideration. *See* 18 U.S.C. § 4202; 10 U.S.C. § 858 (1970).

---

[1] Article 118 (now, 10 U.S.C. § 918) reads:

> Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he –
>
> (1) has a premediated design to kill;
>
> • • • •
>
> shall suffer death or imprisonment for life as a court-martial may direct. May 5, 1950, ch. 169 § 1 (Art. 118), 64 Stat. 140.

Schick filed this action in the District Court, seeking a declaration of his eligibility for consideration for parole pursuant to 18 U.S.C. § 4202, and an order directing the members of the Board promptly to consider him for parole. The District Court granted the defendants' motion for summary judgment upon the ground "that the conditional commutation of plaintiff's sentence was the result of the exercise by the President of his powers under Article II of the Constitution to grant reprieves and pardons for offenses against the United States, and of his autority as Commander in Chief of the Armed Forces and under the provisions of the Uniform Code of Military Justice". Schick appeals. We affirm.

In commuting Schick's sentence the President exercised the authority conferred upon him by Article II, section 2, clause 1 of the Constitution, providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." That power includes the authority to commute a sentence of death to imprisonment for life. *Biddle v. Perovich*, 274 U.S. 480 (1927). Moreover, it is settled that a pardon or a commutation of a sentence may be granted on condition. *Ex parte Grossman*, 267 U.S. 87, 120 (1925); *Semmes v. United States*, 91 U.S. 21, 27 (1875); *United States v. Klein*, 13 Wall. (80 U.S.) 128, 142, (1871); *Ex parte Wells*, 18 How. (59 U.S.) 307 (1855); *Stroud v. Johnston*, 139 F.2d 171, 172 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944). The appellant contends, nevertheless, that the condition imposed in this case is illegal and invalid, since it contravenes the statute providing that a prisoner shall be eligible for parole after serving fifteen years of a life sentence. 18 U.S.C. § 4202 (1970).

The courts have state many times that Congress cannot control or regulate the action of the President in granting pardons or commutations. *See Ex parte Grossman, supra; The Laura*, 114 U.S. 411, 414 (1885); *Ex parte Garland*, 4 Wall.

(71 U.S.) 333, 380 (1866); *Yelvington v. Presidential Pardon & Parole Attorneys*, 94 U.S. App. D.C. 2, 4, 211 F.2d 642, 644 (1954); *Thompson v. Duehay*, 217 F. 484, 487 (D.C.W.D. Wash. 1914), *aff'd*, 223 F. 305 (9th Cir. 1915). Had Congress attempted to fetter the Presidential power by the parole statute a constitutional question might be presented. We think it clear however that Congress had no intention of interfering with the President's authority, and has not done so. This appears from the history of the parole statute itself, noted by the Attorney General in his opinion, *Pardoning Power of the President*, 41 OP. ATT'Y GEN. 251, 255 (1955). The Attorney General said:

> As enacted in 1910, section 10 [of the parole statute] provided that nothing in the act "shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case." 36 Stat. 821, 18 U.S.C. (1946 ed.) 723. This provision does not appear in the 1948 revision of title 18 of the U.S. Code, and the Reviser's Note to section 3570 of that title, dealing with Presidential remission of a sentence, states that the word "pardon" was omitted "as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'This power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380."

Turning to the Uniform Code of Military Justice, Art. 71(a), 10 U.S.C. § 871(a), in force at the time of Schick's sentence, we find this provision:

> No court-martial sentence extending to death or involving a general or flag officer *shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit*, and may suspend the execution of the sentence or any part of the sentence, *as approved by him*, except a death sentence. (Emphasis added). 64 Stat. 131.

The Uniform Code of Military Justice further provided, Art. 76, (now 10 U.S.C. § 876):

> The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code . . . shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, *and the authority of the President.* (Emphasis added). 64 Stat. 132-33.

From the unambiguous language of these statutes it is apparent that Congress intended to, and did, preserve fully the commutation powers of the President by permitting him to "approve * * * such * * * commuted form of [a] sentence as he sees fit." It is also apparent that Congress intended that the action of the President, in the exercise of those powers, should be final, conclusive and binding upon all departments, courts, agencies and officers of the United States. In short, the President's action in this case was not inconsistent with the wishes of Congress as expressed in the parole statute.

Our conclusion on this branch of the case is in accord with the opinion of the Attorney General expressed in *Pardoning Power of the President, supra,* and with the decisions of the Supreme Court of California in *Green v. Gordon,* 39 Cal. 2d 230, 246 P.2d 38, *cert. denied,* 344 U.S. 886 (1952); and *Ex parte Collie,* 38 Cal. 2d 396, 240 P.2d 275 (1952), *cert. denied,* 345 U.S. 1000 (1953). A like result was reached by the Circuit Court of Appeals for the Tenth Circuit in *Hurt v. Moseley,* No. 71-1307, decided in an unreported opinion September 13, 1971.

The appellant argues that confinement without the possibility of parole is cruel and unusual punishment. We think there is nothing to this contention. "By common understanding imprisonment for life is a less penalty than

death." *Biddle v. Perovich,* 274 U.S. 480, 486 (1927), (Holmes, J.). In light of the atrocious nature of Schick's offense the commuted sentence is not out of proportion to his crime. We note further that the federal narcotics statute which precluded the possibility of parole in certain cases, 26 U.S.C. § 7237, was repeatedly upheld against attack on Eighth Amendment grounds. See for example, *United States v. Williams,* 143 U.S. App. D.C. 16, 442 F.2d 738 (1970); *United States v. Lozaw,* 427 F.2d 911 (2d Cir. 1970). This statute applied even in the cases of prisoners sentenced to serve as much as forty years. We also reject the contention that the commuted sentence denies the appellant the equal protection of the laws. Schick is in no worse position than others of his class who were convicted by a court-martial of premeditated murder and sentenced to death during a period when the death penalty was being enforced.

A contention not made in the appellant's brief, but advanced at oral argument, is based upon the decision of the Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972). The argument runs as follows: *Furman v. Georgia* means that the provision for the death penalty in Article 118, UCMJ, 10 U.S.C. § 918 is invalid. Had this been the law at the time Schick was sentenced, he could have been sentenced only to imprisonment for life. 10 U.S.C. § 918. He then would have been committed to a United States Disciplinary Barracks or to a Federal Penitentiary. 10 U.S.C. §§ 858, 3661. In either event he would now be eligible to be considered for parole. 10 U.S.C. § 3663; 18 U.S.C. § 4202.

Had Schick been under a death sentence when *Furman v. Georgia* was decided that ruling would have required the excision of the constitutionally invalid sentence. *Robinson v. Neil,* ____ U.S. ____, 41 U.S.L.W. 4164, 4165 (January 16, 1973). The flaw in Schick's argument is that when the *Furman* case was decided he was not under a death sentence,

and there was therefore nothing to excise. Indeed, as a matter of law, a final and effective sentence of death was never imposed upon Schick. Unlike the judgment and sentence of a court, the sentence imposed by the court-martial was not effective until approved by the President, whose action was by statute made a part of the sentencing process. *See* Article 71(a) UCMJ, 10 U.S.C. § 871 (a). The President did not approve the sentence.

Finally, we are mindful that a pardon or commutation "is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). Such an action of the President, explicitly authorized by the Constitution and exercised in a lawful and proper manner, may not be reviewed by a court, and is not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization. *See Ex parte Grossman*, 267 U.S. 87, 121-22 (1924).

. . The judgment of the District Court is affirmed.

WRIGHT, *Circuit Judge, dissenting*: The United States Board of Parole has refused to consider appellant for parole because the commuted sentence imposed by President Eisenhower includes a "no parole" condition. The sole issue presented is whether this condition is lawful. We are not asked to release appellant, but simply to order the Board to consider his parole application under the same standards as those governing all other federal prisoners.

Appellant brought this action and the District Court considered and decided the case prior to the Supreme Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). The case therefore proceeded under the assumption that the death

penalty initially imposed by the court-martial was valid. Although the President has unquestioned power under the Constitution to commute a death sentence, appellant argued that he lacked power to impose a "no parole" condition. As the majority opinion here indicates, the District Court, with good reason, rejected this argument.

But the matter does not end there. While this case was pending on appeal, the Supreme Court issued its decision in *Furman*, holding that "the imposition and carrying out of the death penalty" constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court, to paraphrase its own words, "has not hesitated" to apply *Furman* retrospectively, without regard to the criteria normally considered in deciding whether to give retrospective effect to a new constitutional rule. *Robinson* v. *Neil*, 409 U.S. 505, 508 (1973). *See, e.g., Stewart* v. *Massachusetts*, 408 U.S. 845 (1972); *Marks* v. *Louisiana*, 408 U.S. 933 (1972). In my view, retrospective application of *Furman* to appellant's case requires us to vacate the death sentence imposed by the court-martial and substitute the only other sentence which lawfully could have been imposed—life imprisonment with the possibility of parole.

I

Although the *Furman* decision itself simply remanded the death penalty cases for further proceedings without spelling out the nature of those proceedings, all courts considering the issue have recognized that retroactive application of *Furman* to any given prisoner requires that the death sentence be vacated and the judgment modified to provide for the appropriate alternative punishment specified by statute for the crime for which the prisoner was sentenced to death. *See Anderson* v. *State*, ___ Fla. ___, ___, 267 So.2d 8,9 (1972); *In re Baker*, ___ Fla. ___, ___ 267 So.2d 331, 332

(1972); *Huggins* v. *Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972); *Sullivan* v. *State*, 229 Ga. 731, 194 S.E.2d 410 (1972). *See also People* v. *Anderson*, 6 Cal.3d 628, 657 n.45, 100 Cal. Rptr. 152, 171 n.45, 493 P.2d 880, 899-900 n.45 (1972). Where there is but one statutory alternative–for example, life imprisonment–that alternative must be imposed. *See People* v. *Anderson*, *supra*. Where the alternative sentence is discretionary–for example, rape statutes where the alternative to the death sentence is imprisonment for life or for any term of years within the discretion of the court–the case must be remanded to the sentencing court for resentencing. *See Anderson* v. *State*, *supra*, 267 So.2d at 10; *Huggins* v. *Commonwealth*, *supra*. *Cf. Sullivan* v. *State*, *supra*. In other words, the court's role after *Furman* is to ensure that the prisoner be treated as if the death sentence was not an available sentence at the time of the original sentencing.[1]

Application of this rule to appellant's case is quite simple. Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918 (1970), under which appellant was convicted of premeditated murder, provides that one so convicted "shall

[1] *See also Sullivan* v. *State*, 229 Ga. 731, ___ 194 S.E.2d 410, 412 (1972) (Jordan, J., concurring specially): "[T]he life sentence now to be imposed * * * shall be subject to all laws and regulations applicable to such sentence as if it had been rendered on the date of the original sentence." It has been assumed that prisoners whose sentences were changed from death to life imprisonment pursuant to *Furman* would become eligible for parole. Thus the legislature of the State of Florida enacted special legislation after *Furman* purporting to require substitution of a life sentence without parole for those sentenced to death prior to *Furman*. *See Anderson* v. *State*, ___ Fla. ___, ___, 267 So.2d 8, 9 (1972). As the Supreme Court of Florida recognized, this statute raised constitutional problems which the court avoided by resentencing prisoners to life imprisonment prior to the effective date of the new statute. *See In re Baker*, ___ Fla. ___, ___ ___, 267 So.2d 331, 334-335 (1972).

suffer death or imprisonment for life as a court-martial may direct." A sentence of death was imposed by the court-martial, and its decision was affirmed by both the Board of Review and the United States Court of Military Appeals. Under *Furman* the death sentence so imposed was unconstitutional and therefore null and void. The only lawful alternative at the time of the original sentencing was a sentence of "imprisonment for life." That sentence must now be substituted for the original death sentence, and appellant must be treated as if he were sentenced to life imprisonment on the date of his original sentence.

Pursuant to statute, all persons sentenced to imprisonment for life by a court-martial eventually become eligible to be considered for parole, there being no statutory authority for a life sentence without parole. If the prisoner is confined in the United States Disciplinary Barracks, his parole opportunities are governed by the parole authority granted the Secretary of the Army, *see* 10 U.S.C. §§ 952-953 (1970), and the regulations promulgated pursuant thereto, and he becomes eligible to be considered for parole after serving 10 years of his sentence. *See* HEADQUARTERS, DEPARTMENT OF THE ARMY, Army Regulation 190-26, ch. 1, ¶ 1-4(a)(2) (March 20, 1972). If the prisoner is transferred to a federal penitentiary, his parole opportunities are governed by the same statutes and regulations as are applicable to all other federal prisoners, *see* 10 U.S.C. § 858 (1970), and he becomes eligible to be considered for parole after serving 15 years of his sentence. *See* 18 U.S.C. §§ 4202-4203 (1970). Since appellant has been imprisoned since 1954, he would now be eligible to be considered for parole under either eventuality.

Applying *Furman* retroactively in this manner, the commutation and condition imposed by President Eisenhower are a nullity, as they were based on an illegal premise. When

appellant was sentenced, the options available to the sentencing court were death or life imprisonment with the possibility of parole. Since *Furman* retroactively strikes the death option, the life option with parole possibilities is retroactively imposed as of the date of sentencing. Any subsequent imposition of a sentence of life imprisonment without parole would, of course, increase appellant's sentence and thus would be beyond the President's constitutional authority to grant reprieves and pardons. *See Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927); *Ex parte Wells*, 59 U.S. (18 How.) 307, 310 (1855).

II

The majority seeks to avoid this logic by noting that appellant was not under a death sentence at the time *Furman* was decided. But this misconstrues both the *Furman* decision itself and the doctrine of retroactivity. *Furman* did more than stop executions, though of course that was its most dramatic effect. Not only did the Court say that the "carrying out" of the death penalty is unconstitutional, but it also expressly held, in language we must assume was carefully chosen, that "the *imposition* * * * of the death penalty * * * constitutes cruel and unusual punishment * * *." 408 U.S. at 239-240. (Emphasis added.) Because *Furman* is totally retroactive, a death sentence imposed before *Furman* is an illegal sentence. And those who were sentenced to death prior to *Furman* not only cannot have their sentences executed; they must be resentenced with a lawful sentence.

Nor is it significant that appellant is not now subject to a death sentence, since he is clearly suffering adverse consequences from the prior imposition of an illegal death sentence. Where a new constitutional rule is fully retroactive, the courts must do more than amend the direct consequences of prior violations of the rule. In addition, they must root out

as much as possible the adverse, albeit indirect, legal consequences of such prior violations.

A good example of this process may be seen in the Supreme Court's decisions concerning the right to counsel in state felony trials. That right, recognized in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), was held wholly retroactive in *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963) (direct appeal), and *Kitchens* v. *Smith*, 401 U.S. 847 (1971) (*habeas corpus*). These cases remedied the direct consequences of prior violations of the right to counsel by overruling felony convictions obtained without counsel. But the retroactivity doctrine extended much further to embrace indirect adverse consequences stemming from prior violations of the right to counsel. In *Burgett* v. *Texas*, 389 U.S. 109 (1967), for example, the Court held that an uncounselled felony conviction obtained prior to *Gideon* could not be used to "enhance punishment" for a subsequent offense through operation of a recidivist statute. Under any other rule, the Court noted, "the accused in effect suffers anew" from the pre-*Gideon* deprivation of his right to counsel. 389 U.S. at 115. Similarly, only recently the Court held in *Loper* v. *Beto*, 405 U.S. 473 (1972), that an uncounselled conviction obtained prior to *Gideon* could not be used to impeach a defendant's credibility, again noting that the defendant had "suffered anew" from the pre-*Gideon* violation. 473 U.S. at 484.

The present case thus falls squarely within normal concepts of retroactivity. Although appellant is not now under a death sentence, he has suffered and continues to suffer enhanced punishment–the loss of his statutory right to be considered for parole–as a result of an illegally imposed death sentence.

Further guidance may be found in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), which held that a petitioner could

maintain a *habeas corpus* action challenging his conviction even though his punishment had been alleviated by his being placed on parole. The rationale of that decision was that the petitioner still suffered certain restraints from the underlying conviction, albeit fewer restraints than incarceration. So here, appellant should be permitted to attack his death sentence, even though it has been ameliorated by presidential pardon, because he is still suffering restraints from the underlying illegal sentence.

It is also important to note that appellant's commuted sentence shares many of the evils of the original death sentence. Like the death sentence, imprisonment for life without the possibility of parole is inconsistent with the principle that the "rehabilitation of the convict [is] a basic purpose of criminal justice." *Furman* v. *Georgia*, *supra*, 408 U.S. at 306 (Mr. Justice Stewart, concurring). *See also id.* at 343 (Mr. Justice Marshall, concurring); *Weems* v. *United States*, 217 U.S. 349, 381 (1910). While I agree that the nonrehabilitative nature of life imprisonment without parole is not sufficient to declare that penalty itself cruel and unusual, the relationship it bears to the death penalty certainly has significance for the retroactive application of *Furman* to this case. For in delimiting its retroactive scope, one must keep in mind the evil sought to be remedied by a new constitutional rule. *Compare Tehan* v. *Shott*, 382 U.S. 406 (1966), *with Burgett* v. *Texas*, *supra*.

As indicated earlier, there is no provision in federal law–civilian or military–for a sentence of life imprisonment without parole. Neither a court-martial nor a judge can impose such a sentence. Congress has ensured that the primary focus of the federal penal system is rehabilitative, looking toward the day when the prisoner can return to

society.[2] The death penalty was a glaring exception, and it has now been held illegal. But the same nonrehabilitative exception lives on in muted form in the sentence appellant is now serving.

III

I confess a certain difficulty in comprehending the majority's argument that a sentence of death was never really imposed on appellant because, under the governing statute, the sentence could not be executed until approved by the President. As the majority properly notes elsewhere, the President's power to grant commutations is a constitutional, not a statutory, power. The President can pardon any conviction for an offense against the United States, whether or not authority to do so is granted by statute. Article 71(a), 10 U.S.C. § 871(a) (1970), which provides that no sentence of death can be executed before approved by the President, simply changes the procedure whereby pardons are granted; it does not affect the substance of the President's pardoning power. In a civilian death penalty case, the prisoner bears the burden of bringing his case to the President's attention for purposes of a commutation. In military death penalty cases, however, the Government was assigned the burden of having a death penalty affirmatively approved. The power of the

[2] Indeed, the principle of parole was recognized in the military long before parole became available for civilian prisoners. The Act of March 3, 1873, ch. 249, § 6, 17 STAT. 583, a direct predecessor of the current military parole statute, provided: "[The commandant of the military prison] shall take note and make record of the good conduct of the convicts, and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited * * *." The first parole statute for civilian prisoners was the Act of June 25, 1910, ch. 387, 36 STAT 819.

President in both cases is the same, the only difference being the allocation between the prisoner and the Government of the burden of going forward to invoke that power. A sentence of death by a court-martial is every bit as final and effective a sentence of death as one imposed by a civilian court.

Rather than support the majority, Article 71(a) demonstrates that the commuted sentence is integrally related to the original death sentence imposed by the court-martial. As the language of Article 71(a) suggests, the sentence approved by the President is not a new sentence, but is simply a "commuted form of the sentence" imposed by the court-martial. It has no basis in law except as such, and is therefore no more lawful than the illegal sentence itself.

It is argued that we should not apply *Furman* retroactively in the manner suggested because to do so amounts to review by a court of the President's exercise of his constitutional power to grant pardons and reprieves. But to apply *Furman* retroactively to appellant in no way indicates any disapproval by this court of the manner in which President Eisenhower exercised his powers of clemency. It was concededly reasonable for both the court-martial and the President not to have foreseen the *Furman* decision. They quite properly assumed that the death penalty was a lawful sentence. But as Mr. Justice Stewart indicated in *Loper v. Beto*, supra, 405 U.S. at 484:

> "* * * It would surely be unreasonable * * * to expect the judge at Loper's trial to have anticipated *Gideon*, just as it would have been unreasonable to have expected the judge at Gideon's trial to have foreseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges that were correct under the law prevailing at the time the judges made them. * * *"

(Footnote omitted.) So here, our substitution of life imprisonment with the possibility of parole for the death

sentence as commuted by the President does not disparage in any way the President's exercise of his pardoning power. Rather it simply reflects the fact that a retroactive change in the law has been made.

With all due respect, the majority's refusal to follow the Supreme Court's dictate and treat *Furman* as totally retroactive seems to represent disagreement with the concept of retroactivity itself. It is suggested that decisions made on the basis of rules then assumed valid are "not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization." But the precedents will not tolerate this disparaging view of retroactive application of new constitutional rules. Was it "*ex post facto* hypothesis and rationalization" when the Supreme Court ruled that the petitioner in *Kitchens* v. *Smith*, *supra*, who had been convicted without counsel some 19 years before *Gideon* v. *Wainwright*, was entitled to release as a result of that decision?

There are all too many for whom the Supreme Court's opinion in *Furman* came too late. For them what is done is done. Even for appellant, retroactive application of *Furman* cannot erase the mental anguish he no doubt experienced during the six years he waited on death row from the time he was initially sentenced to die to the time of the President's commutation. But I can see no reason for not alleviating those effects of the illegal death sentence imposed on appellant which can still be cured. The crime for which appellant was convicted was atrocious, as the majority notes, though the strong evidence of mental illness as a cause of the crime must temper that observation.[3] Under the law,

[3] The facts of the case were that after a chance encounter and a 10-minute conversation appellant simply grabbed his 8-year-old victim and choked her. There was no evidence of a sexual assault. In his confession to the authorities appellant stated he "just had an uncontrollable urge to kill her" and had done so "just because she was there." [continued]

however, even murderers sentenced to life imprisonment are eligible for parole if they can satisfy the Board of Parole that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and • • • [that] such release is not incompatible with the welfare of society." 18 U.S.C. § 4203 (1970). In my judgment, *Furman* requires that appellant be given that chance.

I respectfully dissent.

The sole defense raised at the court-martial related to the sanity issue. Four Army psychiatrists who had examined appellant in Japan found him legally responsible, but the two Japanese psychiatrists who were appointed to examine him disagreed. On appeal the Court of Military Appeals directed that appellant be transferred to the Menninger Clinic for further examination. All the psychiatrists who examined him there, including Dr. Menninger himself, concluded that mental illness was a cause of the killing. Evidently appellant had a lifelong history of mental illness manifested by periodic episodes of uncontrolled violence and psychotic behavior, and had been admitted for in-patient psychiatric hospitalization on 13 occasions during World War II. Indeed, during a temporary separation from the Army after 1946, he received disability benefits based in part on his psychiatric difficulties.

Although the reviewing authorities persisted in their affirmance of the court-martial's finding of responsibility, the record clearly shows that the strong evidence of mental illness played a crucial role in obtaining a presidential commutation.